Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	
	)	
EFFECTS OF COMMUNICATIONS	)	File No. WT Docket No. 03-187
TOWERS ON MIGRATORY BIRDS	)	

COMMENTS OF CINGULAR WIRELESS LLC
And
SBC COMMUNICATIONS, INC.

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SUMMARY

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Cingular Wireless LLC ("Cingular") and SBC Communications, Inc. ("SBC"), by their attorneys, hereby respond to the Commission's *Notice of Inquiry* into the Effects of Communications Towers on Migratory Birds, FCC 03-205, released August 20, 2003 ("NOI"). A summary of the NOI was published in the Federal Register on September 12, 2003.[1] In the NOI, the Commission seeks comment and information on the impact that communications towers may have on migratory birds.[2]

Cingular and SBC support voluntary efforts to reduce bird mortality at communications towers. However, given the dearth of scientific information relating to the cause and significance of the impact of communications towers on migratory birds, a rulemaking proceeding to modify the FCC's environmental rules is premature at this time.

I. Background.

The primary responsibility of the Commission is set forth in the Communications Act, 47 U.S.C. § 151 *et seq.* Since 1934, Congress has repeatedly mandated that the Commission promote the availability of modern, efficient communications services and

[1] 68 FR 53696 (2003).
[2] NOI at 1.

technologies to the American public.[3] In addition to this primary responsibility, Congress has also charged the Commission with protecting the environment.[4] The NOI seeks input on how the Commission can address this latter responsibility while also fulfilling the former.

A number of environmental statutes and regulations exist to protect migratory birds from harm by humans.[5] These include the Endangered Species Act[6] ("ESA"), the National Environmental Policy Act[7] ("NEPA") and the Migratory Bird Treaty Act[8] ("MBTA"). Congress has charged the Department of the Interior with primary responsibility to enforce these environmental statutes. However, each federal agency is responsible for conducting its primary responsibilities with due regard to the impact its decisions have on migratory birds. The FCC has adopted its environmental rules to fulfill its responsibilities under these statutes.[9]

The MBTA was enacted in 1918 to implement a treaty[10] between the United States and Great Britain (acting for Canada) to protect migratory birds that traverse parts of the United States and Canada during their annual migrations. The treaty recited the value of migratory birds for food and the control of insects and recognized "the danger of extermination through lack of adequate protection."[11] The MBTA prohibits the taking,

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[3] In Section 1 of the 1934 Act, 47 U.S.C § 151, Congress charged the Commission "to make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities…." Subsequent amendments to the Act in 1993 and 1996 reiterated the Commission's duty to facilitate the deployment of new communication technologies. *See* 47 U.S.C. § 309 and the Preamble to the Telecommunications Act of 1996.
[4] *See*, *e.g.,* National Environmental Policy Act, 42 U.S.C.A. §§ 4321 *et seq.*
[5] *See* "A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds," http://migratorybirds.fws.gov/intrnltr/treatlaw.html.
[6] 16 U.S.C. §§ 1531-1544.
[7] 42 U.S.C. §§ 4321-4335.
[8] 16 U.S.C. §§ 703-712.
[9] 47 C.F.R. §§ 1.1301-1.1319.
[10] International Convention for the Protection of Migratory Birds, 39 Stat. 1702 (1916).
[11] *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

killing, capturing or selling of migratory birds (and their feathers and other parts) except as permitted by regulations now administered by the Fish and Wildlife Service ("FWS") of the Department of the Interior.

Migratory birds lead a precarious existence. Hundreds of millions of migratory birds die each year as a result of their interaction with humans and their instrumentalities. One researcher estimates that four to five million birds die each year as a result of collisions with communications towers.[12] However, to place that approximation in context, it is estimated that "outdoor" cats kill hundreds of millions of migratory songbirds each year. Dr. Stanley Temple of the University of Wisconsin estimates that between 20 and 150 million songbirds are killed each year by rural cats *in Wisconsin alone*. Dr. Dan Klem of Muhlenberg College estimates that 98 to 976 million birds annually fly into glass windows in homes and office buildings and are fatally injured.[13] One study estimated that pesticide ingestion kills 65 million birds per year.[14] Countless other birds die as a result of collisions with automobiles, airplanes, wind turbines and electric transmission and distribution lines. Oil and contaminant spills also kill millions of birds each year. Estimates of avian mortality from the *Exxon Valdez* spill alone ranged from 350,000 to 500,000 birds.[15]

In addition to these direct causes of avian mortality, Wild Birds Unlimited claims that the loss and degradation of stopover habitat is potentially the greatest threat of all.

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[12] Manville, A.M. II, *The ABCs of Avoiding Bird Collisions at Communications Towers: the Next Steps*, Proceedings of the Avian Interactions Workshop, December 2, 1999 Charleston, S.C., Electric Power Research Institute ("Manville"). *See also* Letter dated September 14, 2000 to Regional Directors from Jamie Rappaport Clark, FWS Director re: Service Guidelines on the Siting, Construction, Operation and Decommissioning of Communications Towers (*FWS Tower Siting Guidelines Letter*). *See also* NPRM at 2.

[13] FWS Office of Migratory Bird Management Pamphlet, *Migratory Songbird Conservation*.

[14] Pimental *et al.*, Environmental and Economic Costs of Pesticide Use. Bioscience 42:750-760 (cited in Manville).

Fragmentation of breeding habitat and destruction of tropical forests on the wintering grounds are cited as two main causes for the sharp decline in numbers of many Neotropical migratory bird species. Wild Birds Unlimited estimates that half of all migrants heading south for the winter will not return to breed in the spring.[16]

Migratory birds also are killed in great numbers by natural causes such as extreme temperatures, drought, floods, forest fires and predators. Thus, viewed in context with other man made and natural causes of bird mortality, the number of birds estimated to die as a result of collisions with communications towers is relatively small.[17]

II. The Incidental Loss of Migratory Birds at Communications Towers Does Not Violate the MBTA.

Despite the relative rarity of bird deaths resulting from collisions with communications towers, the FWS has taken the position that the MBTA is a strict liability statute, and that even incidental bird deaths at communications towers violate the statute.[18] That position is legally untenable. The Courts have held that activities otherwise lawful which indirectly result in the death of migratory birds do not violate the MBTA. *See, e.g., Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110, 114 (8th Cir. 1997), *cert. den. sub nom.*, *Newton County Wildlife Association v. Rogers*, 552 U.S. 1108 (1998) (Section 703 does not prohibit "conduct, such has timber harvesting, that indirectly results in the death of migratory birds."); *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (MBTA does not prohibit the U.S. Forest

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[15] Manville at 3.
[16] Wild Birds Unlimited web site at www.wbu.com/edu/migr.htm.
[17] The FWS does not estimate the total population of all species of migratory birds protected under the MBTA. For purposes of establishing hunting regulations, it does estimate the breeding population of the ten most common species of ducks that nest in Canada and the northern United States. Those ten species had a breeding population of over 40 million birds in 2003, up roughly ten percent from the long term average. FWS, *Waterfowl Population Status, 2003*, released July 23, 2003, Tables 5 and 6.

service "from taking or killing a single migratory bird or nest 'by any means or in any manner' given that the Forest Service's authorization of logging on federal lands inevitably results in the deaths of individual birds and destruction of nests."); *Mahler v. U.S. Forest Service*, 927 F.Supp. 1559 (S.D. Ind. 1996)("[P]roperly interpreted, the MBTA applies to activities that are intended to harm birds or to exploit birds, such as hunting or trapping, and trafficking in birds and bird parts. The MBTA does not apply to other activities that result in unintended deaths of migratory birds.").

Upholding a criminal conviction (and fine of $500.00) against a defendant who released toxic chemicals into a wastewater pond resulting in eighteen bird deaths, the Second Circuit noted: "Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense." *U.S. v. FMC Corp.,* 572 F.2d 902, 905 (2d Cir. 1978).

In *U.S. v. Moon Lake Electric Ass'n., Inc*. 45 F.Supp.2d 1070, 1085 (D. Colo. 1999) a federal district court noted that to convict under the MBTA, the prosecutor must establish that the conduct in question was the "proximate cause" of the death of a protected bird.

> Because the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability under Section 707(a), even if such activities would cause the death of a protected bird. Proper application of the law to an MBTA prosecution, therefore, should not lead to absurd results.

[18] *FWS Tower Siting Guidelines Letter*; Manville at 6 ('(T)he incidental killing of even one bird is legally considered a taking under the MBTA and is technically a violation of the law.")

Thus, the FWS is wrong to assume that the deaths of migratory birds which fly into communications towers constitute violations of the MBTA. Indeed, the construction of the statute favored by the FWS could cause the statute to be declared unconstitutional. In *United States v. Rollins,* 706 F. Supp. 742 (D.Idaho 1989), the Court held the MBTA unconstitutionally vague as applied to the defendant. Rollins applied a mixture of registered pesticides to his alfalfa field in accordance with label instructions. Thereafter, a flock of geese alighted in his field, ate the alfalfa, and died. Rollins was convicted by a Magistrate Judge of violating the MBTA. On review, the District Court found that the MBTA is a strict liability statute and that Rollins lack of intent to kill the geese was irrelevant. Based on that finding, however, the Court declared the MBTA unconstitutional as applied to Rollins;

> Any statute which does not give fair notice as to what constitutes illegal conduct so that an individual may conform his conduct to the law violates the first essential of due process of law.

706 F. Supp. at 744. Thus, any attempt by the FWS to prosecute the owner of a lawfully constructed communications tower for the subsequent death of a migratory bird that flew into the tower could render the MBTA unconstitutional as applied. Voluntary cooperation rather than saber rattling is the most effective means of mitigating the loss of migratory birds at communications towers.

III. Current State of Scientific Information.

As the NOI correctly notes, there is a relative dearth of scientific information relating to the cause and significance of the impact of communications towers on migratory birds.[19] The limited research that is available is dated, and most of it is anecdotal. Because of this lack of scientific information, the FWS in 1999 convened a

Communication Tower Working Group ("CTWG") consisting of representatives of other Federal and state government agencies (including the Federal Aviation Administration and the Federal Communications Commission), the telecommunications and broadcast industries, tower companies, research scientists, and conservation organizations. The CTWG is chaired by the FWS and was specifically tasked to develop and implement a research protocol. The CTWG is looking into factors associated with communications towers, such as lighting, height, and tower type that may have an impact on migratory birds. It is also seeking to develop measures that may minimize migratory bird collisions with towers.[20] While the CTWG conducts its work, the director of the FWS has issued voluntary, interim guidelines for use by FWS personnel and recommended for use by the tower industry. In releasing the interim guidelines, the Director emphasized the voluntary nature of the guidelines and the need to balance the guidelines with Federal Aviation Administration ("FAA") requirements that promote air safety and local community concerns where necessary.[21]

The Commission's existing environmental rules generally are consistent with the FWS interim guidelines. For example, guideline 1 urges companies to collocate new antennae on existing towers where possible. NOTE 1 to Section 1.1306(a) of the Commission's rules notes that "The use of existing buildings, towers or corridors is an environmentally desirable alternative to the construction of new facilities and is encouraged." Guideline 4 urges that new towers should be sited within existing "antenna farms" when possible. NOTE 3 to Section 1.1306(a) encourages the same result by categorically excluding new towers on existing antenna farms from environmental

[19] NOI, ¶ 13.
[20] NOI, ¶ 12.

review. While the Commission's rules track the interim guidelines in many respects, the guidelines go far beyond what is required by the rules in some cases.

The NOI seeks comment on specific attributes of communications towers that may be involved in avian mortality, such as lighting, height, type of antenna structure and location in or near specific habitats.

A. Tower Lighting

The Commission regulates the lighting of communications towers in Part 17 of its Rules.[22] The rules require tower registration and establish standards for communications towers that the Commission determines may constitute a menace to air navigation. The rules require notification to the FAA for construction of towers that exceed 200 feet in height above ground level at the site and towers that are located near airports.[23] Towers meeting these requirements must be painted and lighted in accordance with FAA requirements to protect air safety.[24] Subpart C of Part 17 makes mandatory the FAA specifications for painting and providing obstruction lighting on communication towers.

The FAA specifications require towers 200 feet high or taller to display red or white aircraft warning lights. Some studies indicate that solid red lights are more confusing to birds at night and in inclement weather than solid white or white strobe lights.[25] As a result the interim guidelines of the FWS recommend avoiding solid red or pulsating red warning lights at night.

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[21] *FWS Tower Siting Guidelines Letter* at 1-2.
[22] 47 C.F.R. § 17.1 et seq.
[23] 47 C.F.R. § 17.7.
[24] 47 C.F.R. § 17.23.
[25] Kerlinger, P. 2000. *Avian Mortality at Communication Towers: A Review of Recent Literature, Research, and Methodology*, Prepared for the FWS Office of Migratory Bird Management ("Kerlinger"), citing papers by Beason and Gauthreaux, among others, presented at the Workshop on Avian Mortality at Communication Towers, August 11, 1999, Cornell University, Ithaca, NY. Kerlinger at 23. Kerlinger also cites unpublished work by L.K. Raynor *et al.* which found that White–throated sparrows were more

Most songbirds migrate at night at altitudes (500-2000 meters) that are far above most communications towers.[26] When the celestial aids and landscape features relied upon by migrating birds are obscured by cloudy or foggy weather, birds migrate at lower altitudes. It is during inclement weather at night that most tower strikes may occur.[27] Unfortunately, it is precisely during periods of adverse weather that tower lighting is most critical to air safety.

While the Commission has a role in regulating communications towers, the FAA has primary responsibility for protecting air safety. The color and brightness of lights on communications towers should continue to be addressed by the FAA in the first instance. Cingular and SBC are concerned with the FWS interim guidelines pertaining to tower lighting. Guideline 5 states that for towers the FAA requires to be lit "the minimum amount of pilot warning and obstruction avoidance lighting required by the FAA should be used." Until more research is done on the impact of tower lighting on migratory birds, Cingular and SBC urge caution in adopting guidelines that could impair air safety. Indeed, the FAA has ultimate responsibility for lighting requirements and its impact on the environment, and Cingular and SBC have no choice but to follow the FAA requirements.

B. Tower Height

The Commission's rules contain no limit on tower height. The FWS interim guidelines, however, strongly urge communications service providers to construct

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attracted to white light than to colored light. Kerlinger at 19. Clearly, more work needs to be done before the Commission considers any rule changes based on the current state of scientific research.

[26] Wild Birds Unlimited web site, www.wbu.com/edu/migr.htm.

[27] Kerlinger, citing Beason.

towers no more than 199 feet above ground level.[28] There is no support for such a limit on tower height in the scientific literature. Indeed, the guideline appears to be related to the tower lighting requirement, rather than any inherent danger to migratory birds from a 200 foot communications tower. Kerlinger reports that the scientific literature provides little evidence that towers less than 400-500 feet are involved in deaths of more than a few birds.[29] In an unpublished paper summarized by Kerlinger, Crawford and Engstrom report the results of a 28 year study at a northern Florida television tower that was shortened from 600/1000 feet to 300 feet tall. Bird fatalities decreased from 257 deaths per year to only eight deaths in the year after the tower was shortened.[30] Based on the limited information available, it does not appear that migratory bird mortality would justify restrictions on towers less than 400 feet tall.

On September 17, 2003, the Wireless Telecommunications Bureau released notice of an agreement with the State of Michigan to conduct a two and one-half year Avian Collision Study in connection with its statewide Michigan Public Safety System ("MPSCS"). Designed by Kerlinger and Manville, the study will systematically research the effects of lighting, height, and guy wires on avian collisions with selected towers in the 350-500 foot height range. This effort should enhance the scientific knowledge of the causes of avian mortality at communications towers and will explore the possibility of reasonable and cost effective measures to minimize the impact of these new towers on migratory birds.

[28] *FWS Tower Siting Guidelines Letter*, Guideline 2.
[29] Kerlinger at 22.
[30] Kerlinger at 10.

C. Type of Antenna Structure

The literature suggests that the taller the tower, the more likely it is to be involved in bird deaths.[31] The FWS interim guidelines discourage tower designs requiring guy wires and suggest that towers with guy wires should have daytime visual markers on the wires.[32] There appears to be very little evidence in the scientific literature that one type of tower structure or another is more dangerous to migratory birds. Again, tower height, rather than the type of antenna structure, seems to be implicated in migratory bird strikes.

D. Location of Antenna Structures

The Commission's existing rules require the preparation of an environmental assessment ("EA") prior to siting facilities in officially designated wilderness areas and wildlife preserves and facilities that may affect threatened or endangered species or critical habitats.[33]

The FWS interim guidelines go much further. The guidelines discourage tower construction in or near wetlands, other known bird concentration areas, in known migratory or daily movement flyways or in habitats of threatened or endangered species. The interim guidelines also discourage siting towers in areas with a high incidence of fog, mist or low ceilings.[34] Of course, it is not always possible to avoid locating towers in such areas and still provide seamless wireless service to the public.

Many of the criteria embodied in the FWS interim guidelines are extremely vague and subject to interpretation. While Cingular and SBC support voluntary measures to

[31] Kerlinger at 14-15 (citing Kemper),
[32] *FWS Tower Siting Guidelines Letter* at 3.
[33] 47 C.F.R. § 1.1307(a)(1)-(3).
[34] *FWS Tower Citing Guidelines Letter* at 2-3.

choose tower sites that minimize risk to migratory birds, their primary responsibility is to provide modern, reliable communications services to the public.

Section 1.1307 permits the Commission to review tower siting decisions in environmentally sensitive areas on a case-by-case basis to minimize adverse environmental impacts. The existing Commission rules regarding tower siting issues are adequate.

IV. Conclusion.

Cingular and SBC support voluntary efforts to reduce bird mortality at communications towers. The ongoing efforts of the CTWG and the Michigan study should lead to increased scientific understanding of the causes of avian mortality at communications towers and may lead to better means of protecting migratory birds from tower deaths. Cingular and SBC see no need for the Commission to institute a rulemaking proceeding to modify its environmental rules at this time.

Respectfully submitted:

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s/ M. Robert Sutherland

November 12, 2003

CERTIFICATE OF SERVICE

I, M. Robert Sutherland, counsel to Cingular Wireless LLC, certify that, on November 12, 2003, I have sent the foregoing "Comments of Cingular Wireless LLC and SBC Communications, Inc." via Internet e-mail to:

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